

Topic 8: The Geographic Scope of the Waters to Which EPA’s Federal Standards Apply.

EPA’s Decision: The HHC contained in the federal rule are designed to protect the designated use of sustenance fishing as exercised by the Tribes in Maine. The HHC thus apply to waters where that designated use is approved. EPA approved a sustenance fishing designated use in two general categories of waters: (1) waters in Indian lands, and (2) waters outside Indian lands where the sustenance fishing right reserved in section 6207(4) of the Maine Implementing Act (MIA) applies.¹ The first category, “waters in Indian lands,” covers waters within the tribes’ reservations and trust lands as provided for under the settlement acts. The second category applies in the limited circumstances where it is determined that one or both of the Southern Tribe’s sustenance fishing right reserved in MIA section 6207(4) extends to a waterbody outside of its reservation as defined under the settlement acts.

The outer bounds of waters that may fall within the two categories of the rule are based on the settlement acts and are thereby generally identifiable.² For example, the Settlement Acts define the geographic scope of the reservations.³ The tribes’ trust lands are all the result of modern conveyances recorded after the 1980 settlements, the boundaries of which are described in the deeds for those parcels.

The rule, however, does not identify the specific boundaries of each waterbody or portion thereof to which the HHC apply. Whether a specific waterbody falls within one of these categories will depend on the status of such water under applicable federal and state law. The status of such a waterbody may therefore change or be determined as a result of litigation or other legal developments regarding that specific waterbody.⁴ The two general categories of waters to which the HHC apply, however, will remain constant.

¹ For “waters in Indian lands,” EPA’s rule promulgated HHC as well as six other WQS (narrative and numeric bacteria criteria for the protection of primary contact recreation and shellfishing; ammonia criteria for protection of aquatic life in fresh waters; provisions that ensure that WQS apply to HHC even if they are naturally occurring; a mixing zone policy; a pH criterion for fresh waters; and tidal temperature criteria). For the second category of waters, where there is a sustenance fishing designated use outside of waters in Indian lands, the rule promulgated only the HHC. This paper focuses on the HHC because the HHC apply to the broadest set of tribal-related waters and because the comments addressing the geographical scope of the rule were largely framed in terms of concerns about the HHC.

² For purposes of conducting its economic analysis for the rule, EPA took a conservative approach and identified all discharges for which there is any reasonable potential that they discharge to waters in Indian lands or their tributaries. In doing so, EPA identified a total of only 33 facilities, a small subset of the 478 Maine Pollutant Discharge Elimination System (MEPDES) permitted dischargers in the state.

³ For example, MIA defines the Passamaquoddy Indian Reservation as, in part, “those lands reserved to the Passamaquoddy Tribe...limited to Indian Township in Washing County; Pine Island, sometimes referred to as Taylor’s Island, located in Big Lake, in Washington County; 100 acres of land located on Nemcass Point, sometimes referred to as Governor’s Point, located in Washington County....”

⁴ For example, there is an ongoing dispute regarding the boundaries of the Penobscot Nation’s reservation and the scope of its sustenance fishing right. In 2015, the District Court held that the Penobscot Nation’s reservation as defined in MIA was limited to the lands of certain specified islands, but that the Tribe had a right to sustenance fish in the entirety of the Main Stem of the Penobscot River. *Penobscot Nation v. Mills*, 151 F.Supp. 3d 181, 222-23 (D. Me. 2015). The First Circuit Court of Appeals very recently affirmed the lower court’s ruling on the Reservation’s definition, but held that the scope of the Penobscot Nation’s fishing right was not ripe for review and that the Tribe lacked standing to pursue the issue under current circumstances. *Penobscot Nation v. Mills*, Nos. 16-1424, 16-1435,

Maine's Position:

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EPA's Response:

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